Date: August 16, 1996
Case No.: 95-INA-19

In the Matter of:

BORIS SHMULEVICH,
Employer

On Behalf Of:

KLARA FRIDMAN,
Alien

Appearance: Eliezer Kapuya, Esq.
For the Employer/Alien

Before: Huddleston, Jarvis, and Vittone
Administrative Law Judges

RICHARD E. HUDDLESTON
Administrative Law Judge

DECISION AND ORDER

The above action arises upon the Employer's request for review pursuant to 20 C.F.R. § 656.26 (1991) of the United States Department of Labor Certifying Officer's ("CO") denial of a labor certification application. This application was submitted by the Employer on behalf of the above-named Alien pursuant to § 212(a)(14) of the Immigration and Nationality Act of 1990, 8 U.S.C. § 1182(a)(14) (1990) ("Act"). The certification of aliens for permanent employment is governed by § 212(a)(5)(A) of the Act, 8 U.S.C. § 1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under § 212(a)(14) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that, at the time of the application for visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and, (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good-faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File,[1] and any written argument of the parties. 20 C.F.R. § 656.27(c).

Statement of the Case

On August 26, 1993, Boris Shmulevich ("Employer") filed an application for labor certification to enable Klara Fridman ("Alien") to fill the position of Child Tutor (AF 26). The job duties for the position are:

> Will tutor children and will be responsible in developing their manners and behaviours (sic). Will educate children concerning academic and behavioral development, oversee diet, recreation, health, deportment.

The requirements for the position are two years of experience in the job offered.

The CO issued a Notice of Findings on December 29, 1993 (AF 19), proposing to deny certification on the grounds that the Employer failed to return resumes in violation of 20 C.F.R. § 656.21(j)(1)(iii), the results of the first recruitment cannot be ignored, and the two years of experience requirement is unduly restrictive for the normal performance of the position in the United States in violation of § 656.21(b)(2)(i)(A).

In its rebuttal, dated April 2, 1994 (AF 7), the Employer contended that the two-year requirement is "not as a matter of pleasure but only as a matter of business necessity," and that the tutor will "teach and develop the Russian language to the employer's child." The Employer further contended that the CO had approved a two-year experience requirement for a "Bilingual Children's tutor" in the application of Shokoufeh Moghtassed, and submitted a copy of that application stamped as approved by the CO (AF 9).

The CO issued the Final Determination on April 8, 1994 (AF 3), denying certification

[1] All further reference to documents contained in the Appeal File will be noted as "AF *n*," where *n* represents the page number.

because the Employer had not readvertised nor established the business necessity of the two-year experience requirement.

On April 15, 1994, the Employer requested review of the denial of labor certification (AF 1). The CO denied reconsideration and forwarded the record to this Board of Alien Labor Certification Appeals ("BALCA" or "Board").

Discussion

Section 656.21(b)(2) proscribes the use of unduly restrictive job requirements in the recruitment process. The reason unduly restrictive requirements are prohibited is that they have a chilling effect on the number of U.S. workers who may apply for or qualify for the job opportunity. The purpose of § 656.21(b)(2) is to make the job opportunity available to qualified U.S. workers. *Venture International Associates, Ltd.,* 87-INA-569 (Jan. 13, 1989) (*en banc*). Where an employer cannot document that a job requirement is normal for the occupation or that it is included in the *Dictionary of Occupational Titles* (DOT), or where the requirement is for a language other than English, involves a combination of duties, or is that the worker live on the premises, the regulation at § 656.21(b)(2) requires that the employer establish the business necessity for the requirement.

In this case, the CO correctly found that the Employer's requirement of two years of experience was excessive for the position of child tutor. See *Dictionary of Occupational Titles* at 099.227-010. The CO notified the Employer that this finding could be rebutted by establishing that the job requirement: (1) bears a reasonable relationship to the occupation in the context of the Employer's business; and, (2) is essential to perform the job in a reasonable manner. See *Information Industries, Inc.*, 88-INA-82 (Feb. 9, 1989) (*en banc*); § 656.21(b)(2)(i).

In rebuttal, the Employer provided a letter which stated that the CO had approved a similar application with two years of experience required, and that the position involved teaching the Russian language to the Employer's child. The Employer also states that the experience is required because the child requires "the outmost (sic) attention and care in regards to his educational needs" (AF 7).

Clearly, the Employer's rebuttal does not respond to the CO's notice in the NOF, other than in vague and unsupported assertions, which are insufficient to demonstrate business necessity. See *Inter-World Immigration Service*, 88-INA-490 (Sept. 1, 1989); *Tri-P's Corp.*, 88-INA-686 (Feb. 17, 1989). The Employer's rebuttal does not show either that the requirement bears a reasonable relationship to the occupation, or that it is essential to perform the job in a reasonable manner. Failure to address a deficiency noted in the NOF supports a denial of labor certification. *Belha Corp.*, 88-INA-24 (May 5, 1989) (*en banc*); *Reliable Mortgage Consultants*, 92-INA-321 (Aug. 4, 1993); *Mr. and Mrs. Mohammad Yusuf*, 93-INA-334 (July 22, 1994).

Moreover, in rebuttal the Employer adds the duty of teaching his child the Russian language (AF 7). Neither the application nor the newspaper ads contain the additional duty of teaching the Russian language, and the addition of this duty appears to be an attempt by the Employer to conform to approved applications of "bilingual child tutors" (AF 26). The

Employer must use Items 14 and 15 on the ETA 750 to notify the CO of its minimum requirements. *Bell Communications Research, Inc.*, 88-INA-26 (Dec. 22, 1988). Denial of labor certification is proper where the employer adds duties not listed in the application and newspaper ads. See *Esther Mosher*, 90-INA-253 (July 22, 1991); *Steve and Debbie Shaw*, 89-INA-266 (May 29, 1991).

Finally, the Employer's reliance on a previously approved application is misguided. Such applications are not binding on this Board as precedent, and even if they were, the application offered by the Employer presents an entirely different set of facts and duties.

Based on the foregoing, we find that the CO's denial of labor certification was proper.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

Entered this the _____ day of August, 1996, for the Panel:

_____
Richard E. Huddleston
Administrative Law Judge

NOTICE OF PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless, within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such a review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions for such review must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a

written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with the supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition, the Board may order briefs.